NO. 82474-6

SUPREME COURT
OF THE STATE OF WASHINGTON

GEORGE KELLEY

Respondent,

v.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.,

Petitioner.

BREIF of AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS

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I. IDENTITY AND INTEREST OF *AMICUS*

Washington Defense Trial Lawyers ("WDTL") is an organization of lawyers representing defendants in civil litigation which occasionally appears as *Amicus Curiae*, by and through the undersigned who represents the organization on a *pro bono* basis. WDTL submits this brief supporting Defendant Centennial Contractors Enterprises, urging the Supreme Court to reverse the decision of the Court of Appeals. Amicus WDTL submitted a brief in the Court of Appeals.

II. INTRODUCTION

Plaintiff-Respondent George Kelley brought this suit on behalf of minor children of Phillip Blackshear. Mr. Blackshear previously sued Centennial for a 2003 workplace injury. His case proceeded to a jury trial in September 2005 resulting in a verdict for Plaintiffs. Only six months after the verdict, Plaintiff Kelley as *guardian ad litem* for his minor children (using the same attorney who represented Blackshear in the initial lawsuit) filed this new action.

The trial court correctly exercised its discretion when it held that joinder of the children's claims was "feasible" in the first lawsuit. The Court of Appeals incorrectly ruled that the trial court abused its discretion by finding "no facts" that "made it apparent to the Blackshear family that they ought to withhold claims of the children." VRP at 3-4. The trial

court's dismissal of the children's lawsuit should be reinstated.

III. STATEMENT OF THE CASE

Amicus will not repeat the facts of the April 2003 accident that lead to this lawsuit. But for reasons that have not been adequately explained, the Blackshears' initial case neglected to include claims on behalf of their minor children.

Plaintiff Kelly claims that it was not until two years after the catastrophic injury to their father that the children "knew and finally understood that their relationship with their father would forever be affected when he was rendered permanently disabled as a result of an unfortunate accident." *Kelley's Op. Brf.*, Ct. Apps. Div. II No. 36089-6 at 1-2. He tries to suggest that the family expected "recovery" to result from a "hopeful" 2005 surgery which, presumably, would obviate an interest in pursuing consortium claims for the children. *Id.* at 2.

Kelley's own description belies the notion that Mr. Blackshear's serious, ongoing pain and disability could be expected to abruptly end. The father's condition was obviously serious enough to have effects on his children as soon as the accident occurred. Mr. Blackshear was not ever able to work after the accident and suffered "severe and persistent back pain. *Id.* at 4-5. Whether or not the hoped-for results of the 2005 surgery materialized, the result was not some sort of culminating event for

"ripening" the children's claims. *Id.* at 3.

Tort victims who initially believe their injuries are only moderately serious, are not excused from bringing a lawsuit within the statute of limitations just because their injuries later prove to be more disabling than expected. Had the children brought consortium claims initially, no one would argue that their claims should have been dismissed because the father's surgery was successful. Contrary to the Court of Appeals ruling, later developments—whether they improved or complicated the "damages" experienced—have no bearing on whether it was "feasible" to join the children's claims in the initial lawsuit.

IV. ARGUMENT

The proper result would be to hold that, although the children would have been entitled to pursue claims for loss of their father's consortium in the original suit, they are barred from doing so in this second lawsuit. They have not met their burden of proving that joinder of their claims in their father's lawsuit was not "feasible." *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984).

It is a routine matter for tort claimants to include a loss of consortium claims for children by the simple act of naming children in the caption, pleading damages on their behalf, and designating one of the parents as *guardian ad litem.* Obtaining a court order authorizing a

guardian ad litem to bring tort claims for minor children is a routine (almost perfunctory) matter. And even where the parties have forgotten to obtain an order of appointment, this procedural mistake has ***not*** been deemed a "jurisdictional defect."

A. If the Failure to Appoint a *Guardian ad Litem* Renders Joinder of the Children not "Feasible" in the Parent's Lawsuit, then Such Joinder Will Always Be at the Whim of Parents.

The Court of Appeals decision adopted the definition of "feasible" set forth in *Huggins by Huggins v. Sea Ins. Co.*, 710 F. Supp. 243 (E.D.Wis.1989), "the child plaintiff has the burden of showing that joinder was 'impossible, impractical, or not in the child's best interest to have claims joined with those of the injured parent.'" *Kelley v. Centennial Contractors Enterprises*, 147 Wn. App. 290, 298 (Div. II 2008). But under the guise of defining the term "feasible" as a matter of law, the Court substituted its judgment for that of the trial court in deciding whether joinder was "feasible" as a matter of fact in this case.

The Court of Appeals held that it was "impossible" for the children to appear in the injured father's lawsuit citing the fact that the guardian had not been appointed: "[W]ithout a guardian it was legally impossible for the children to have joined their claim with that of their parents. Thus as a *matter of law*, joinder was not legally feasible and was, therefore, impossible." 147 Wn. App. at 298. This ignores Washington caselaw that

the failure to appoint a guardian ad litem, while rendering an order voidable, is not a jurisdictional defect. *Dependency of A.G.*, 93 Wn. App. 268, 280, 968 P.2d 424 (1998)("But a court's failure to comply with that requirement is not a jurisdictional defect."). The ruling also eviscerates the feasibility requirement.

If this holding stands, even if future plaintiffs *intentionally* omit children's claims for some perceived tactical advantage, their actions will not be called to account. The decision by the parent (or their lawyer) to not appoint a *guardian ad litem* will *always* automatically override the interests of judicial economy and fairness to defendants.

Curiously, it was this same point that the Court of Appeals relied upon in *rejecting* Kelley's argument that the defendant's motion to dismiss was moot. "[U]nder Kelley's reasoning, because joinder is not possible once a claim has been adjudged, all *Ueland* claims brought after a judgment has been entered would pass the feasibility test because joinder is no longer possible. This result would give no recognition to the *Ueland* court's clear limitation of independent claims to ones where joinder was not feasible. *Ueland*, 103 Wn.2d at 137." 147 Wn. App. 296.

B. Defendants Should Not Bear the Burden of Bringing Nonparty Children of Plaintiffs Into Litigation.

With the Court of Appeals decision, defendants face a dilemma in

litigating parents' claims when children's claims have not been pleaded: Do they simply *hope* that the children's claims will never be brought? Do they take some affirmative step to bring the children's claims before the court so that the potential for future claims can be eliminated? Do they even have the legal right to force a child to become a plaintiff? See, *Brief of Amicus Curiae WDTL*, Court of Appeals, at 8-11.

According to plaintiff Kelley, the *defendant* should be saddled with insuring that the children's claims are considered. Kelley's *Supplemental Brief of Appellants,* at 7, states:

> As this Court discussed during oral argument, Centennial Contractors Enterprises, Inc. had the ability to request that the Court appoint a guardian to represent the interest of these children prior to their father's trial. This did not occur.

And in a footnote, Kelley adds:

> Appellants anticipate that Respondents may argue that Appellants' parents are to blame for the children's failure to file suit at an earlier time. This argument, if made, simply highlights the reason why Washington law requires appointment of a guardian ad litem. As notes above, this did not occur until after their father's trial had concluded.

Id., note 3.

The obvious conflict of interest presented to defense counsel is reason alone for rejecting the notion that the defense should insure plaintiffs' children have been adequately represented. That responsibility is squarely on plaintiffs' counsel's shoulders. Moreover, there will be

parents who, after careful thought, decide against involving their children in litigation. Why would a court, or an appointed guardian, choose to overrule parents who prefer that their children's claims not be included? What protections does a defendant have against multiplicity of suits perhaps many years apart—when an informed decision has been reached by parents that their children's claims will not be pursued?

The simplistic rule adopted by the Court of Appeals decision takes none of these matters into account.

C. The Trial Court Did Not Abuse Its Discretion When It Decided the Children Did Not Carry Their Burden on the Feasibility of Joinder.

The Court of Appeals noted that, "Impracticality of joinder and a determination of the children's best interests are questions of fact, and the trial court's resolution of those questions will not be disturbed on review absent an abuse of discretion." 147 Wn. App. at 299. The appellate court concluded the trial court "abused its discretion" when it did not consider impossibility, impracticality and the children's best interests. Yet, the Court treated factual determinations of the trial court as if they were errors of law even though they involved an exercise of trial court's discretion in viewing the facts and weighing them in the context of the legal standard. A factual inquiry is important to the weighing of interests at stake in the feasibility determination.

A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Gildon v. Simon Prop. Grp.*, 158 Wn.2d 483, 494, 145 P.2d 1196 (2006). The trial court's decision does not meet this standard. The Court of Appeals rejected the trial court's finding that the evidence showed Mr. Blackshear was "always getting worse," had continuously been out of work since the accident, and that the trial court could find "no facts" that should have indicated they should withhold the children's claims.

According to Kelley, joinder was not feasible because "further delay" would have lead to financial hardship for the family and that until the results of Mr. Blackshear's final surgery was known "it was impractical to assert the children's cause of action for loss of parental consortium." The Court uncritically adopted Kelley's arguments that it was not until after the parents' case was completed (when it became known Blackshear would not return to work), that "evidence": arose of the children's losses. "[E]vidence of loss of parental consortium must exist before the parents' trial for such joinder to be practical and in the child's best interests." 147 Wn. App. At 301.

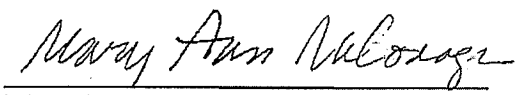
The Court of Appeals presumably believed the father's ultimate work status was the necessary "evidence" needed for the children to have a claim. This is wrong. As the trial court was aware, the father had been

continuously unable to work throughout the time the parents' lawsuit was pending. Why would "evidence" of the children's loss of consortium suddenly arise only when the father's inability to work supposedly became permanent. If Blackshear unexpectedly improved and becomes employable during pendency of the children's lawsuit, will the children's losses then evaporate? It is the Court of Appeals' decision and reasoning that it is "manifestly unreasonable" and "untenable." The appellate court wholly failed to demonstrate abuse of discretion by the trial court warranting reversal.

V. CONCLUSION

For the reasons stated herein, the Court of Appeals' decision should be reversed, and the trial court's dismissal of this case reinstated.

DATED this 21st day of December 2009.



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